

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JULIAN RICARDO CHACON,

Defendant.

Case No. 2:08-cr-00059-JCM-GWF

**FINDINGS & RECOMMENDATIONS**

**Defendant's Motion to Suppress  
Evidence - #24**

This matter is before the Court on Defendant's Motion To Suppress Evidence (#24), filed on December 29, 2008 and the Government's Response to Defendant's Motion To Suppress (#28), filed on January 20, 2009. The Court conducted an evidentiary hearing in this matter on March 5, 2009.

**FACTUAL BACKGROUND**

The indictment in this case charges Defendant Juan Ricardo Chacon with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). *See Indictment (#1)*, filed on March 12, 2008. This indictment arises out of a police stop of Defendant's automobile on July 22, 2006 and the subsequent search of the vehicle trunk which resulted in the discovery of a Sig Sauer 9 millimeter pistol. Defendant allegedly made statements to the police officers acknowledging that the pistol belonged to him. According to the indictment, Defendant Chacon had previously been convicted of felonies in 2000 and 2004 which made it unlawful for him to possess a firearm.

The subject incident began on July 22, 2006 at approximately 11:37 a.m. when an individual called the Las Vegas Metropolitan Police Department's emergency "911" number. The recording of the 911 call was played during the evidentiary hearing. The caller told the 911 dispatcher: "I just saw a guy put a woman in the trunk of a Cadillac." The caller stated that he observed this occur in a store parking

1 lot located at Cheyenne and Las Vegas Boulevard. The caller stated that he was following the Cadillac,  
2 which he described as a tan late 1990's model STS. He also read the license plate number of the vehicle  
3 to the dispatcher. The caller described the driver of the Cadillac as possibly a Hispanic male in his 30's,  
4 of medium build and wearing dark colored jeans and a black and green or blue and green shirt. He  
5 described the woman as a white woman of medium to medium heavy build, wearing white or blue shorts  
6 and a tank top. The caller also provided the dispatcher with his first name and telephone number and a  
7 description of the vehicle he was driving. As the call continued, the caller told the dispatcher that the  
8 Cadillac had pulled into the parking lot behind a 7-Eleven store located at Cheyenne and Lamb  
9 Boulevard. The caller stated that he had passed that location and was no longer observing the Cadillac.  
10 The police dispatcher broadcast a "priority zero" call over the radio notifying officers that an individual  
11 has seen a male put a female in the trunk of a vehicle. The dispatcher provided the description of the  
12 Cadillac and its license number and stated that it had pulled into the 7-Eleven station at Cheyenne and  
13 Lamb.

14 Las Vegas Metropolitan Police Officers Anthony Rhodes and Eric Carlson testified at the  
15 evidentiary hearing. Officer Rhodes testified that a "priority zero" dispatch call is the highest level  
16 priority call. He responded to the call and was the first police officer to arrive at the 7-Eleven store.  
17 Upon arriving, he observed the Cadillac parked in the front of the 7-Eleven station near the gas pumps.  
18 Officer Rhodes testified that he stopped his patrol vehicle behind the Cadillac and activated his  
19 emergency lights and siren to notify the driver of the Cadillac that the police were behind him. As he did  
20 this, other officers arrived on the scene.

21 Officer Rhodes testified that because the dispatch report involved a possible kidnaping, he and  
22 the other officers conducted a "felony stop." He and other officers ordered the driver of the Cadillac,  
23 who was subsequently identified as Defendant Chacon, to exit the vehicle. The officers had their  
24 firearms drawn and pointed at the Defendant. Officer Rhodes ordered Defendant to raise his hands and  
25 walk backwards to the patrol vehicle. Once the Defendant was near him, Officer Rhodes holstered his  
26 firearm and placed Defendant in handcuffs and performed a pat down search of his person. Officer

27 . . .

28 . . .

1 Rhodes testified that he and Officer Eric Carlson then left Defendant with Officer Carlson's partner,  
2 Officer Urena, while they proceeded to the vehicle trunk.<sup>1</sup>

3       Upon opening the trunk, the officers observed a female lying inside. The female was talking on  
4 a cellular telephone. The woman, who was subsequently identified as Melissa Buterbaugh, exited the  
5 trunk and was then escorted by Officer Urena to his and Officer Carlson's patrol vehicle located  
6 approximately 30 feet from where Defendant was standing by Officer Rhodes' vehicle. Officer Rhodes  
7 testified he did not speak with the woman at that point. He acknowledged on cross-examination,  
8 however, that he took the cell phone away from Ms. Buterbaugh and that she became upset at this. Ms.  
9 Buterbaugh asked why he took her cell phone away, and stated that she was talking to her father and that  
10 she had not done anything wrong. Officer Rhodes testified that the woman was also placed in handcuffs.

11       Officer Rhodes testified that he then obtained Defendant Chacon's identification from him. He  
12 advised Defendant Chacon of his Miranda rights because he was suspected of possible kidnaping.  
13 According to the Metropolitan Police Department Dispatch Log, Officer Rhodes "Mirandized"  
14 Defendant Chacon at approximately 11:44 a.m. *Defendant's Exhibit "I."* Defendant acknowledged  
15 that he understood his rights and he agreed to speak with Officer Rhodes. After Officer Rhodes  
16 explained why the officers were there, Defendant Chacon stated that there was no kidnaping and that the  
17 woman had voluntarily gotten into the trunk. Officer Rhodes then asked Defendant Chacon for  
18 permission to search the vehicle. He testified that Defendant responded by stating "go ahead."

19       Officer Rhodes testified that upon obtaining Defendant's consent to search the vehicle, he looked  
20 into the open trunk of the Cadillac. He observed a handgun in the trunk in plain sight. He advised  
21 Officer Carlson that there was a gun in the trunk. The Dispatch Log entry at 11:59 a.m. indicates that a  
22 gun was found in the trunk. *Defendant's Exhibit "I."* After searching the trunk, Officer Rhodes stated  
23 that he searched the backseat area of the vehicle. He found a bag in the center backseat armrest/console  
24

---

25       <sup>1</sup>Officer Rhodes testified that several other police officers arrived at the 7-Eleven shortly after he  
26 arrived on the scene. In addition to Officers Rhodes, Carlson and Urena, the unit log lists seven other  
27 officers who were present at the scene during the course of the stop. *Defendant's Exhibit "K."*  
28 According to Officer Rhodes' and Officer Carlson's testimony, other than Officer Urena, these other  
officers do not appear to have been actively involved in the incident once the Defendant was handcuffed.

1 that was later determined to contain methamphetamine. He also observed that there was an opening  
2 from the rear seat armrest/consol into the trunk. Officer Rhodes then searched the front seat area of the  
3 vehicle. He testified that he found drug paraphanelia in the front seat area and also found another bag  
4 containing methamphetamine in the glove compartment. After completing the search, Officer Rhodes  
5 informed Officer Carlson what he had found in the vehicle.

6 Officer Rhodes testified that he then proceeded to question Defendant Chacon further about the  
7 circumstances of the woman being in the trunk and what was found in the vehicle. Defendant Chacon  
8 stated that he purchased the handgun for \$50.00 and that it was for protection. He stated that when he  
9 observed the officers, he slid the gun into the trunk through the opening in the backseat armrest/console.  
10 Defendant Chacon stated that Ms. Buterbaugh was his girlfriend and that her father had told Defendant  
11 Chacon that he did not want him dating his daughter. Ms. Buterbaugh did not believe this. A meeting  
12 had been or was being arranged between Defendant and the father. Ms. Buterbaugh got into the trunk so  
13 that she would be able to over hear what her father said to Defendant and then confront him. Officer  
14 Rhodes testified that after speaking with Defendant Chacon a records check was run on the Defendant  
15 and the handgun. The records check revealed that the handgun was stolen and that Defendant Chacon  
16 was still on probation for a felony conviction. Defendant was then apparently placed under arrest.

17 Officer Eric Carlson testified that he and Officer Urena also responded to the 7-Eleven store  
18 pursuant to the radio dispatch report. He testified that Officer Rhodes arrived shortly before or about the  
19 same time. Officer Carlson described the felony stop and seizure of Defendant consistent with the  
20 description provided by Officer Rhodes. Officer Carlson also testified that upon opening the trunk, he  
21 observed a female who was just ending a conversation on a cell phone. Officer Carlson stated that the  
22 officers ordered her out of the vehicle. The woman appeared very calm and under no distress. Officer  
23 Carlson testified that the woman was directed to the front of his patrol vehicle by Officer Urena and was  
24 placed in handcuffs. Officer Carlson testified that he was positioned between the two police patrol  
25 vehicles which were stopped several feet apart. Officer Urena was interviewing Ms. Buterbaugh and  
26 Officer Rhodes was interviewing Defendant Chacon. Officer Carlson testified that he moved closer to  
27 Officer Rhodes and Defendant Chacon and listened to the conversation between them. Officer Carlson  
28 testified that he heard Defendant Chacon's explanation why the woman had been in the trunk. Officer

1 Carlson testified that he also heard Officer Rhodes request permission from Defendant Chacon to search  
2 the vehicle and that Defendant Chacon gave verbal consent to search the vehicle. Officer Carlson  
3 testified that Officer Rhodes then proceeded to the Defendant's vehicle while Officer Carlson remained  
4 by the Defendant. Officer Rhodes looked in the trunk and told Officer Carlson that "I have a 413"  
5 meaning that he had found a gun inside the trunk. Officer Carlson also testified that Officer Rhodes read  
6 Defendant Chacon his Miranda rights. It was unclear from Officer Carlson's testimony whether he  
7 recalled this occurring before or after Officer Rhodes searched the vehicle. Officer Carlson also testified  
8 that Defendant Chacon told Officer Rhodes that he had purchased the gun for \$50.00 and that he placed  
9 it in the trunk through the rear set armrest/consol opening. Officers Rhodes and Carlson both testified  
10 that they were not informed of Ms. Buterbaugh's statements to Officer Urena until after Defendant  
11 Chacon gave verbal consent to search his vehicle and Officer Rhodes discovered the gun.

12 During the stop, it was determined that the registered owner of the Cadillac was Maribella  
13 Posadas. At some point, Ms. Posadas was apparently contacted by one of the officers about picking up  
14 her vehicle. During the evidentiary hearing, Defendant introduced a recording and transcript of a  
15 telephone call between the police dispatcher and Officer Michael Purcaro that occurred at 12:50 p.m.  
16 *Defendant's Exhibits "A" and "B."* The dispatcher asked Officer Purcaro if he was out on the subject  
17 call. After Officer Purcaro responded yes, the dispatcher advised that she had the owner of the vehicle,  
18 Maribella Posadas, calling in and she wanted to know where the vehicle was located and if she needed to  
19 come pick it up. Officer Purcaro responded: "Um, actually she can come out here and we can get a  
20 consent to search from her. That would be great. It's at Lamb and Cheyenne at the 7-11." *Defendant's*  
21 *Exhibit "B."* The police department "unit log" record indicates that Officer Purcaro was present at the  
22 scene by 11:40 a.m. and would therefore have been present shortly after Defendant Chacon was detained  
23 and when the handgun was found in the vehicle by Officer Rhodes.

24 Officer Rhodes testified that Officer Purcaro was not actively involved in the incident. He stated  
25 that Officer Purcaro would not have been aware that he obtained Defendant Chacon's consent to search  
26 the vehicle at the time the consent was given, but that Officer Purcaro might have been informed of it  
27 during the course of the investigation. He acknowledged that Officer Purcaro may have been aware of  
28 the discovery of the gun during the search of the vehicle. Officer Rhodes had no recollection of speaking

1 with Officer Purcaro about obtaining the owner's consent to search the vehicle. Officer Carlson also  
 2 testified that he did not recall any conversation with Officer Purcaro about obtaining the owner's consent  
 3 to search the vehicle. Officer Carlson also did not recall Officer Purcaro being actively involved in the  
 4 investigation.

### 5 DISCUSSION

6 The Fourth Amendment secures "the right of the people to be secure in their persons, houses,  
 7 papers and effects against unreasonable searches and seizures." U.S. Const. Amend. IV. The Fourth  
 8 Amendment protects reasonable and legitimate expectations of privacy. *Katz v. United States*, 389 U.S.  
 9 347 (1967). The Fourth Amendment protects "people not places." *Id.* Evidence obtained in violation of  
 10 the Fourth Amendment, and evidence derived from it, may be suppressed as the "fruit of the poisonous  
 11 tree." *Wong Sun v. United States*, 371 U.S. 471 (1963).

#### 12 **1. Whether the Officers Had Reasonable Suspicion to Stop and Detain the** 13 **Defendant Based on the 911 Call:**

14 Defendant initially challenges whether the officers had probable cause or reasonable suspicion to  
 15 stop and detain him based on the 911 call. Law enforcement officers may stop and detain an individual  
 16 when they have reasonable suspicion to believe that the person is engaged in or about to engage in  
 17 criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968). Whether information provided by an  
 18 informer is sufficient to support probable cause or reasonable suspicion must be determined by the  
 19 totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527  
 20 (1983); *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). *White* states that  
 21 because reasonable suspicion is a less demanding standard than probable cause, it can arise from  
 22 information that is less reliable than that required to show probable cause. Therefore, information  
 23 provided by an informer that might not be sufficient to establish probable cause to conduct a search may  
 24 be sufficient to justify a *Terry* stop. *White* further states:

25 Reasonable suspicion, like probable cause, is dependent upon both the  
 26 content of the information possessed by the police and its degree of  
 27 reliability. Both factors—quantity and quality—are considered in the  
 28 "totality of the circumstances—the whole picture," *United States v. Cortez*,  
 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), that must  
 be taken into account when evaluating whether there is reasonable  
 suspicion. Thus, if a tip has a relatively low degree of reliability, more

1 information will be required to establish the requisite quantum of  
2 suspicion than would be required if the tip were more reliable.

3 *Id.* 496 U.S. at 330.

4 At the time the officers ordered Defendant Chacon out of his vehicle at gunpoint and placed him  
5 in handcuffs, they had information based on a 911 call that the driver of the vehicle had been observed  
6 putting a woman in the trunk of the vehicle. There was, at that point, no other information either  
7 corroborating the caller's information or clearly indicating that a crime had occurred. The Court  
8 therefore concludes that the 911 caller's information was not sufficient to establish probable cause to  
9 arrest. The question is, however, whether it provided reasonable suspicion of criminal activity to justify  
10 the initial seizure and detention of the Defendant.

11 In *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), an anonymous tipster  
12 called the police and stated that a young black male standing at a particular bus stop and wearing a plaid  
13 shirt was carrying a gun. Based on this information, the police went to the location and observed the  
14 defendant who matched the tipster's description. The police detained the defendant, conducted a pat  
15 down search and found a handgun on his person. The Supreme Court held that the information provided  
16 by the anonymous informer did not have sufficient indicia of reliability to provide the officers with  
17 reasonable suspicion that defendant was carrying a concealed firearm. The Court stated:

18 An accurate description of a subject's readily observable location and  
19 appearance is of course reliable in this limited sense: It will help the police  
20 correctly identify the person whom the tipster means to accuse. Such a  
21 tip, however, does not show that the tipster has knowledge of concealed  
22 criminal activity. The reasonable suspicion here at issue requires that a tip  
23 be reliable in its assertion of illegality, not just in its tendency to identify a  
24 determinate person. Cf. 4 W. LaFave, Search and Seizure § 9.4(h), p. 213  
(3d ed. 1996) (distinguishing reliability as to identification, which is often  
important in other criminal contexts, from reliability as to the likelihood of  
criminal activity, which is central in anonymous-tip cases.)

24 529 U.S. at 27.

25 In *United States v. Terry-Crespo*, 356 F.3d 1170, 1174 (9<sup>th</sup> Cir. 2004), the court distinguished  
26 *Florida v. J.L.* in evaluating whether an informant's tip provided in a 911 emergency call was sufficient  
27 to provide officers with reasonable suspicion to detain the defendant. In *Terry-Crespo*, an individual  
28 called 911 and reported that three minutes earlier a man had threatened him with a .45 handgun. The



1 informer provided a physical description of the suspect and the location where the threat had occurred.  
2 The informer also told the 911 operator that his name was “Jose Domingis.” In response to the  
3 operator’s request for his phone number, however, the informer stated that he was using another person’s  
4 cellular phone and did not know the return number. He also did not provide any alternative number  
5 where he could be reached. A police operator immediately dispatched officers to check the area where  
6 the informer had reported the threat. The officers observed the defendant who matched the description  
7 of the suspect provided by the 911 caller. The officers detained the defendant at gunpoint and conducted  
8 a pat down search during which a .45 caliber handgun fell out of his pants. The defendant was  
9 subsequently charged with being a convicted felon in possession of a firearm in violation of 18 U.S.C. §  
10 922(g). Following the incident, the police were unable to find the informer “Jose Domingis.” The 911  
11 call was recorded, however, and admitted into evidence.

12 In holding that the 911 call provided reasonable suspicion for the police to stop and detain the  
13 defendant, the court found certain factors which increased the reliability of the caller’s information.  
14 First, the caller was not a completely anonymous tipster and was therefore entitled to greater reliability.  
15 In this regard, the court cited Justice Kennedy’s concurring opinion in *Florida v. J.L.* that “[w]hile ‘a tip  
16 might be anonymous in some sense, it may have certain other features either supporting reliability or  
17 narrowing the likely class of informants so that the tip does provide the lawful basis for some police  
18 action.’ (citation omitted.)” *Terry-Crespo*, at 356 F.3d at 1174. Because the caller provided his name to  
19 the 911 operator, his tip had a greater degree of reliability even though the police were unable to locate  
20 him afterwards. The court also noted that there was nothing about the caller’s identification which  
21 suggested that he was providing a false name. The court declined to impose a duty on the police to  
22 confirm the identity of every 911 caller who provides his or her identity. Because the 911 call was  
23 recorded and introduced in evidence, the court was also not presented with “the specter of after-the-fact,  
24 police fabrication of an ‘anonymous informant.’” *Id.* at 1175.

25 Second, the 911 call was entitled to a greater degree of reliability because police must take 911  
26 emergency calls seriously and respond with dispatch. The court noted that exigent situations may limit  
27 the police’s ability to gather identifying information, and that delay in attempting to verify an identity or  
28 obtain corroboration of a reported emergency may prove costly to public safety and undermine the 911



1 system's usefulness. *Terry-Crespo*, at 1176. The fact that the caller reported that he had just been  
2 threatened with a firearm was sufficient to constitute an emergency situation. Third, the court also noted  
3 that by providing information about his identity, the informant placed his anonymity at risk and exposed  
4 himself to possible criminal sanction for making a false report. Fourth, the call had a greater degree of  
5 reliability because it evidenced first-hand information from a crime victim laboring under the stress of  
6 recent excitement. The caller was providing information about criminal activity that had just occurred,  
7 and the caller was also seeking immediate police aid.

8       The 911 call in this case was at least as reliable as the call in *Terry-Crespo*. The 911 call was  
9 recorded and played during the evidentiary hearing. The caller provided his first name and his telephone  
10 number to the 911 operator. He also provided a description of the vehicle he was driving. While it is  
11 unknown to the Court whether the caller was subsequently identified by the police, he was not an  
12 anonymous tipster. By providing his telephone number to the operator, the caller exposed himself to the  
13 risk of being identified and subject to legal sanction if it was later determined that he made a false report.  
14 The caller also remained on the phone for a few minutes after he provided his phone number which  
15 provides additional indicia of his reliability. The call clearly involved an emergency situation. The  
16 caller reported that he had just seen "a guy put a woman in the trunk of a Cadillac." The caller was  
17 reporting his firsthand observation moments after it occurred and while he still engaged in following the  
18 vehicle.

19       The touchstone of the Fourth Amendment is reasonableness. *Terry-Crespo*, 356 F.3d at 1176.  
20 Adults do not normally get into automobile trunks voluntarily. They especially do not engage in such  
21 conduct on a summer day in Las Vegas, Nevada. The 911 caller's information that he had just seen a  
22 man put a woman in the trunk of a Cadillac therefore clearly raised reasonable suspicion that a kidnapping  
23 crime was in progress which required an immediate police response before the vehicle disappeared into  
24 traffic or the woman reported to be in the trunk suffered injury or further injury. The emergency

25 ...

26 ...

27 ...

28 ...

1 circumstances did not afford the police the option to investigate further before they acted. Stated  
 2 otherwise, it would have been unreasonable for the police to not have responded as they did.<sup>2</sup>

3 **2. Whether The Manner and Length of Defendant's Detention Violated the**  
 4 **Fourth Amendment:**

5 *United States v. Charley*, 396 F.3d 1074, 1080 (9<sup>th</sup> Cir. 2005) states that “[n]o ‘litmus-paper test’  
 6 exists for determining when a seizure exceeds the bounds of an investigative stop.’ *Florida v. Royer*, 460  
 7 U.S. 491, 506, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Eberle v. City of Anaheim*, 901 F.2d 814, 819  
 8 (9<sup>th</sup> Cir. 1990).” The court is, again, required to examine the totality of the circumstances in deciding  
 9 whether an investigative detention has ripened into an arrest. The inquiry focuses on the perspective of  
 10 the person seized, rather than on the subjective beliefs of the law enforcement officers. The question is  
 11 whether a reasonable innocent person in the same circumstances would not have felt free to leave after  
 12 brief questioning. *Id.*

13 The Supreme Court has also declined to adopt a bright line rule for how long an investigative  
 14 stop based on reasonable suspicion may last before it becomes a *de facto* arrest, which must be supported  
 15 by probable cause. In determining whether the length of the detention is reasonable, the court must  
 16 consider whether the officers diligently pursued a means of investigation that was likely to confirm or  
 17 dispel their suspicions quickly during the time it was necessary to detain the defendants. *United States v.*  
 18 *Sharpe*, 470 U.S. 675, 686, 105 S.Ct. 1568, 1575 (1985). In *Sharpe*, the court held that a detention  
 19

---

20  
 21 <sup>2</sup>Defendant has not contended that Officer Rhodes and Carlson acted illegally in initially opening  
 22 the trunk. The officers were clearly justified in doing so as soon as they had secured Defendant Chacon.  
 23 In regard to warrantless searches of premises, *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126  
 24 S.Ct. 1943, 1947 (2006) states that “[o]ne exigency obviating the requirement of a warrant is the need to  
 25 assist persons who are seriously injured or threatened with such injury. ‘The need to protect or preserve  
 26 life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or  
 27 emergency.’ (citation omitted).” Here, the police had reasonable suspicion of a possible kidnapping in  
 28 progress and that the victim was in the trunk of the vehicle. The police were therefore justified in  
 opening the trunk to free a possible victim and protect her from injury before taking other steps to  
 investigate the circumstances. It also appears that the officers limited their initial opening of the trunk to  
 determine if there was a woman inside and, if so, freeing her. The officers did not otherwise search the  
 trunk at that point.

1 which lasted twenty minutes until the officer discovered narcotics and placed defendant under arrest was  
 2 reasonable. In *United States v. Mayo*, 394 F.3d 1271, 1276 (9<sup>th</sup> Cir.2005), the defendant was detained  
 3 between 20 and 40 minutes before the officers determined that there was probable cause to arrest him. In  
 4 holding that the length of the detention did not exceed the reasonable bounds for a *Terry* stop, the court  
 5 stated that the period of detention was permissibly extended because new grounds for suspicion of  
 6 criminal activity continued to unfold.

7 Under ordinary circumstances, drawing weapons and using handcuffs are not part of a *Terry* stop.  
 8 *United States v. Miles*, 247 F.3d 1009, 1012-13 (9<sup>th</sup> Cir. 2001), citing *Washington v. Lambert*, 98 F.3d  
 9 1181, 1187 (9<sup>th</sup> Cir. 1996). *Miles* further states, however:

10 Nevertheless, “we allow intrusive and aggressive police conduct without  
 11 deeming it an arrest when it is a reasonable response to legitimate safety  
 12 concerns on the part of the investigating officers.” [*Lambert*], at 1186;  
 13 accord *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1320 (9<sup>th</sup> Cir.  
 14 1995) (“it is well settled that when an officer reasonably believes force is  
 15 necessary to protect his own safety or the safety of the public, measures  
 16 used to restrain individuals, such as stopping them at gunpoint and  
 17 handcuffing them, are reasonable.”) In determining whether a stop  
 18 amounts to an arrest, we also consider the specificity of the information  
 19 that leads the officers to suspect that the individuals they intend to question  
 20 are the actual suspects being sought” and the “the number of police  
 21 officers present.” *Lambert*, 98 F.3d at 1189-90.

22 *Miles*, 247 F.3d at 1012-13.

23 In *United States v. Charley*, the court held that the defendant was not subjected to an unlawful  
 24 arrest where the officer questioned the defendant in his patrol car. In so holding, the court cited its  
 25 previous decision in *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9<sup>th</sup> Cir. 2002), that an  
 26 investigative stop did not become an arrest where the officers stopped a suspect in the mistaken belief  
 27 that he was a burglary suspect, ordered him out of his vehicle at gunpoint, handcuffed him and placed  
 28 him in the back of their patrol car. The officers then drove the defendant to the reported scene of the  
 crime where they confirmed that he was not the suspect. As the court in *Charley* noted:

25 The district court granted summary judgment for the defendants, and we  
 26 affirmed, holding that the police conduct at issue “did not exceed the  
 27 bounds of a valid investigatory stop,” because the purpose of the stop was  
 28 for the police “to make sure that they ha[d] the right person,” and cuffing  
 the plaintiff and bringing him to the alleged crime scene was “not, under  
 the circumstances, an unreasonable way of finding out if [the plaintiff] was  
 the person they were looking for.”

1 *Charley*, 396 F.3d at 1081.

2 In *United States v. Elston*, 479 F.3d 314, 320 (4<sup>th</sup> Cir. 2007), the Fourth Circuit also held that an  
3 investigatory stop did not become an unlawful arrest because the police officers detained defendant, who  
4 was reportedly armed and had made threats, at gunpoint and placed him in handcuffs. The court stated:

5 Importantly, the techniques that the officers used to effect Elston's  
6 detention were consistent with an investigatory stop under *Terry*. Our  
7 decisions have recognized that "drawing weapons, handcuffing a suspect,  
8 placing a suspect in a patrol car for questioning, or using or threatening to  
9 use force does not necessarily elevate a lawful stop into custodial arrest.  
*Leshuk*, 65 F.3d at 1109-10. These officers reasonably suspected that  
Elston was armed and dangerous and thus did not exceed the limits of a  
*Terry* stop by drawing their weapons and placing Elston in handcuffs.

10 In this case, the 911 caller reported to the operator that he had just seen a man put a woman in the  
11 trunk of a Cadillac and then drive away from the parking lot where this occurred. Although the word  
12 "put" was ambiguous, the tone of the caller's voice and the circumstances were such as to provide  
13 reasonable suspicion that the woman had been forced into the trunk. The dispatcher broadcast this  
14 incident to the police officers as a "zero," i.e. highest level, priority call. Based on the information, the  
15 officers had reasonable suspicion that the driver of the Cadillac was engaged in a kidnaping and might be  
16 armed and pose a danger to the officers. The Court also infers that there is a significant risk that a  
17 suspect will attempt to escape in such circumstances. Under these circumstances, the officers' conduct  
18 in ordering the Defendant to exit his vehicle at gunpoint and then placing him in handcuffs was  
19 reasonable.

20 Upon detaining the Defendant, the officers acted promptly to open the trunk and determine if  
21 there was a woman inside. They thereupon observed Ms. Buterbaugh lying in the trunk and engaged in a  
22 cellular telephone call. At that point, the officers' reasonable suspicion that the woman was a kidnaping  
23 victim obviously began to dissipate. The circumstances, however, were sufficiently unusual that it was  
24 reasonable for the officers to investigate further to determine whether Defendant had committed a crime  
25 against Ms. Buterbaugh or whether Mr. Chacon and Ms. Buterbaugh were engaged in or about to engage  
26 in some other criminal activity.

27 After Ms. Buterbaugh exited the trunk, Officer Rhodes returned to Defendant Chacon. Officer  
28 Rhodes testified that he advised the Defendant of his Miranda rights because he still considered him a

possible kidnaping suspect. He then informed Defendant Chacon of the reason for the stop and the Defendant agreed to speak with him. The Defendant told Officer Rhodes that there was no kidnaping and that the woman had voluntarily entered the trunk. At that point Officer Rhodes asked Defendant for permission to search his vehicle and the Defendant said "go ahead." Officer Rhodes proceeded to search the vehicle whereupon he immediately discovered the gun in the trunk. The discovery of the handgun and Officer Rhodes' further discovery of what appeared to be controlled substances provided additional grounds for investigation. *United States v. Mayo, supra*. That discovery, the further interview with the Defendant and the results of the records check provided probable cause to arrest the Defendant. Additionally, Officer Rhodes' discovery of what appeared to be illegal controlled substances also provided probable cause to arrest.

It is not clear from the officers' testimony how much time passed from when Defendant was initially detained until Officer Rhodes discovered the firearm in the vehicle. It appears from the dispatch log and unit log introduced into evidence, *Exhibits "I" and "K,"* that Officer Rhodes arrived on the scene and initiated the detention at approximately 11:40 a.m. According to the dispatch log, Defendant was "Mirandized" at 11:44 a.m. *Defendant's Exhibit "I."* An entry in the log at 11:59 a.m. states that a "413," i.e. a firearm, was found in the trunk of the vehicle. It is not clear, however, that this was the actual time at which the firearm was discovered. Fifteen minutes appears to be longer than it would have taken for Officer Rhodes to advise Defendant of his rights, advise him of the purpose of the stop, and to obtain his consent to search the vehicle. In any event, no more than 20 minutes elapsed from when the detention began until the gun was found. Based upon the totality of the circumstances, the Court concludes that the police officers acted diligently in investigating their suspicions and did not unreasonably prolong the detention. The Court also finds that the measures taken by the officers, including ordering Defendant to exit the vehicle at gunpoint and placing him in handcuffs, did not transform the investigatory stop into a custodial arrest.

**3. Whether Defendant Consented to a Search of the Vehicle and, if so, Whether His Consent Was Voluntary:**

Defendant's counsel disputes that Defendant Chacon actually gave Officer Rhodes consent to

1 search his vehicle.<sup>3</sup> Defendant's counsel bases his argument primarily on the recorded conversation  
2 between Officer Purcaro and the dispatcher at 12:50 p.m. in which Officer Purcaro indicated that the  
3 owner of the vehicle could come to the arrest location to pick up the vehicle "and we can get a consent to  
4 search from her." Officer Purcaro did not testify at the hearing and his reason for desiring the owner's  
5 consent to search is unknown. Defendant's counsel suggests that there was no reason for Officer Purcaro  
6 to desire the owner's permission to search the vehicle if the officers had already obtained Defendant  
7 Chacon's consent. On the other hand, the dispatch log confirms that the gun was found in the trunk at  
8 least 51 minutes before Officer Purcaro made this statement. *Defendant's Exhibit "I."* Obtaining the  
9 owner's consent to search after the incriminating evidence has already been discovered, and after  
10 Defendant was already under arrest for possession of the firearm, would not have cured a Fourth  
11 Amendment violation. One can therefore only speculate why Officer Purcaro thought it useful to obtain  
12 the vehicle owner's consent to search. Officer Purcaro's statement and the speculation arising therefrom  
13 is not sufficient to overcome Officers Rhodes and Carlson's testimony that Defendant gave his consent  
14 to search the vehicle.

15 Some doubt must exist, however, when probable cause is lacking, but the police officers testify  
16 that they obtained verbal consent to search. Doubt also exists where it does not appear logical for the  
17 suspect to give consent. In this case, Defendant Chacon, a convicted felon, was presumably aware that  
18 the officers would find the poorly concealed firearm and narcotics if they searched the vehicle.  
19 Notwithstanding these doubts, Officers Rhodes and Carlson were credible witnesses. The Court does  
20 not have sufficient basis to conclude that they committed perjury. It therefore accepts their testimony  
21 that Defendant Chacon gave Officer Rhodes consent to search the vehicle.

22 Having concluded that Defendant Chacon gave Officer Rhodes consent to search the vehicle, the  
23 next question is whether his consent was voluntary. A search conducted pursuant to a valid consent is  
24 constitutionally permissible. *United States v. Soriano*, 361 F.3d 494, 502 (9<sup>th</sup> Cir. 2004), citing  
25 *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Whether consent  
26 to search was voluntary is determined from the totality of the circumstances and it is the government's

---

27  
28 <sup>3</sup>Defendant Chacon did not testify at the hearing.

burden to prove that the consent was freely and voluntarily given. *Id.*, citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir.1997). The Ninth Circuit has identified five factors, none of which is individually dispositive, to determine whether a consent to search was voluntary. These factors are: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that he had the right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. *Id.* See also *United States v. Washington*, 490 F.3d 765, 775 (9<sup>th</sup> Cir. 2007). In applying these factors, *Soriano* states:

It is not necessary to check off all five factors, but “many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.” *Chan-Jimenez*, 125 F.3d at 1327 n. 3. Nevertheless, these factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry. *Bustamonte*, 412 U.S. at 224, 93 S.Ct. 2041 (rejecting “talismanic definition of ‘voluntariness’ mechanically applicable” to all situations); see also *United States v. Morning*, 64 F.3d 531, 533 (9th Cir.1995) (“although we have established these factors to aid in the decision making process, the full richness of every encounter must be considered ... Every encounter has its own facts and its own dynamics. So does every consent”).

*Soriano*, 361 F.3d at 502.

In this case, two factors support a conclusion that Defendant’s consent to a search was not voluntary -- he was in handcuffs, i.e., in custody<sup>4</sup> and he was not notified of his right to refuse consent. The factors which support a finding of voluntariness include that Defendant was given Miranda warnings and no statement was made to Defendant that a search warrant could or would be obtained if he refused to consent. In addition, no guns were being pointed at Defendant at the time he consented to the search. As *Soriano* states, these factors are not a mechanized formula to resolve the voluntariness inquiry and the court must consider the totality of the circumstances. In *United States v. Perez-Lopez*, 348 F.3d 839, 846-47 (9<sup>th</sup> Cir. 2003), the court also questioned the significance of giving of Miranda warnings in determining whether consent was voluntary. The court noted that reliance on the Miranda factor is based on the First Circuit’s decision in *United States v. Gorman*, 380 F.2d 158 (1<sup>st</sup> Cir. 1967), in which the court stated the idea that things which might be found in a search could be used against an accused was

---

<sup>4</sup>For the reasons set forth in the previous section, however, Defendant was not under arrest.



1 implicit in the warning of the right to remain silent. *Perez-Lopez* noted, however, that a defendant may  
2 not understand that Miranda warnings are equally applicable to his right to refuse to consent. The court  
3 stated that “[i]t is open to question, therefore, whether the inclusion or exclusion of Miranda warnings in  
4 a given set of circumstances should weigh much in either direction in considering voluntariness.” *Id.*,  
5 *Perez-Lopez*, 348 F.3d at 847.

6 Although some of the factors support a contrary conclusion, based on the totality of the  
7 circumstances, the Court finds that Defendant’s consent to search the vehicle was voluntary. Prior to  
8 Officer Rhodes requesting Defendant’s consent to search the vehicle, Ms. Buterbaugh had been released  
9 from the trunk. Defendant had been advised of his Miranda rights, and he had also been informed that  
10 the officers had stopped his vehicle because of a report of a possible kidnaping. Defendant agreed to  
11 speak with Officer Rhodes and advised him that the woman had voluntarily entered the trunk and there  
12 had been no kidnaping. The Court concludes that Defendant’s willingness to speak with the officers and  
13 to permit them to search the vehicle in response to be informed of the reason for the stop, was a  
14 voluntary decision on his part. It was, of course, ill advised from Defendant’s standpoint, since it led to  
15 the discovery of evidence that supported his arrest on other grounds.

#### 16 CONCLUSION

17 The Court concludes that the police officers had reasonable suspicion, based on the 911 call, to  
18 detain Defendant as a kidnaping suspect. The officers, therefore, also had reasonable suspicion that  
19 Defendant might be armed and dangerous which justified the methods used during the detention and did  
20 not transform the detention into *de facto* arrest. The length of the detention under the circumstances was  
21 reasonable. The Court also finds that Defendant gave his consent for the officer to search his vehicle and  
22 that his consent was voluntarily given. Accordingly,

#### 23 RECOMMENDATION

24 **IT IS RECOMMENDED** that Motion To Suppress Evidence (#24) be **denied**.

#### 25 NOTICE

26 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in  
27 writing and filed with the Clerk of the Court within ten (10) days. The Supreme Court has held that the  
28 courts of appeal may determine that an appeal has been waived due to the failure to file objections within

1 the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure  
2 to file objections within the specified time and (2) failure to properly address and brief the objectionable  
3 issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of  
4 the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United*  
5 *Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

6 DATED this 23rd day of March, 2009.

7  
8   
9 GEORGE FOLEY, JR.  
United States Magistrate Judge